

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-2133

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERT J. ENRIGHT,

PETITIONER-APPELLEE,

-v.-

UNITED STATES OF AMERICA,

RESPONDENT-APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING EN BANC

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PRELIMINARY STATEMENT

Petitioner-appellee Robert Enright respectfully petitions this Court for a rehearing en banc of its decision of February 8, 1978 in the above-titled case.

In a per curiam order, this Court, by Hon. William Hughes Mulligan, Murray I. Gurfein, and

Frederick van Pelt Bryan, reversed a decision of the United States District Court for the Southern District of New York, Hon. Charles M. Metzner, which had granted petitioner-appellee's motion to vacate a previously imposed sentence, pursuant to 28 U.S.C. §2255.* Petitioner's claim was based on a violation of the Interstate Agreement on Detainers. The Court relied on the earlier decision in Edwards v. United States, 564 F.2d 652 (2d Cir. 1977), that a claim under the Interstate Agreement on Detainers is not cognizable under 28 U.S.C. §2255, and therefore remanded the instant case "for the entry of an order in accordance with Edwards."

Petitioner-appellee respectfully suggests that the Court en banc reconsider the result reached in Edwards and in the instant appeal on the ground that the novel limitations these cases impose upon the scope of jurisdiction under §2255 conflict with the

* A copy of this Court's order is attached. Judge Metzner's opinion has been reported at 434 F.Supp. 1056, and is reproduced in the Joint Appendix filed herein [hereinafter cited as "JA"] at 87-90 and 172-77.

language of §2255, the policies underlying that statute, the intent of Congress in enacting the Interstate Agreement on Detainers, prior Supreme Court and Second Circuit case law, and the weight of authority in other jurisdictions. The jurisdictional issue posed by these cases is of exceptional importance to an entire class of litigants because the restrictions implemented in Edwards are unique and would render collateral relief unavailable to numerous federal prisoners whose convictions were obtained in violation of federal law.

POINT I

THE RESTRICTIONS ON §2255 JURISDICTION IMPOSED BY EDWARDS ARE UNJUSTIFIABLE.

- A. A Claim That a Federal Conviction Was Obtained
in Violation of a Law of the United States
Must be Cognizable Under Section 2255.

Title 28 U.S.C. §2255 provides, in pertinent part, that a motion to vacate sentence may be made by a federal prisoner

claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such

sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack (emphasis added)

The Interstate Agreement on Detainers is unquestionably a "law of the United States," see Edwards, supra at 654 n.2, and petitioner Enright has established beyond doubt that his conviction was obtained in violation of the clear mandate of that law. See 434 F. Supp. 1056; JA at 87-89, 172-77. In Davis v. United States, 417 U.S. 333 (1974), the Supreme Court held that, despite earlier dicta, a claim that a conviction is in violation of a law of the United States may be raised in a motion pursuant to §2255. Thus, it is clear that petitioner's claim is within the ambit of jurisdiction under §2255.

B. Other Jurisdictions Have Found Claimed Violations of the Interstate Agreement on Detainers Cognizable on Collateral Attack.

In every reported decision discovered by counsel, other jurisdictions, on the basis of this straightforward reasoning, have concluded that an asserted violation of this "law of the United States" is cognizable on collateral attack. See United States ex rel.

Esola v. Groomes, 520 F.2d 830 (3d Cir. 1975);* Beebe v. Vaughn, 430 F. Supp. 1220 (D. Del. 1977); Stroble v. Egeler, 408 F. Supp. 630 (E.D. Mich. 1976), rev'd & remanded on other grounds, 547 F.2d 339 (6th Cir. 1977). All three of these cases were federal habeas corpus petitions brought by state prisoners under 28 U.S.C. §§2241 & 2254, on the ground that a state had violated their rights under the Interstate Agreement on Detainers. The scope of jurisdiction under §2255 is exactly commensurate with the scope of jurisdiction under §2254, see Davis, supra at 343; United States v. Hayman, 342 U.S. 205, 210-19 (1952), so a claimed violation of a law of the United States which may be raised by a state prisoner necessarily may be raised by a federal prisoner. In fact, considerations of comity pose greater reason to decline to hear claims by state prisoners based on a state's violation of their rights. As the Supreme Court pointed out in Kaufman v. United States, 394 U.S. 217, 228 (1969), it would be anomalous to provide state prisoners with greater access to federal collateral attack than federal prisoners.

* This Court relied on the reasoning of the Third Circuit in Esola in reaching the decision in United States v. Mauro, 544 F. 2d 588 (2d Cir. 1976), cert. granted, 46 U.S.L.W. 3183 (October 4, 1977).

Similarly, in every reported decision discovered by counsel, District Courts in this Circuit and in other jurisdictions have considered the merits of claims based on the Interstate Agreement on Detainers in §2255 proceedings. United States v. Simmons, 437 F. Supp. 621 (W.D. Pa.1977); Huff v. United States, 437 F. Supp. 564 (W.D. Mo. 1977); United States v. Boyd, 437 F. Supp. 519 (W.D. Pa. 1977); Adams v. United States, 423 F. Supp. 578 (E.D.N.Y. 1976), aff'd, 559 F.2d 1202 (2d Cir. 1977) (table); Enright, supra, 434 F. Supp. 1056.

Thus, this Court appears to be the first and only jurisdiction to have found a basis for limiting §2255 jurisdiction to preclude consideration of a violation of the Interstate Agreement on Detainers.

C. The Test Applied in Edwards Is Not Established by Supreme Court Precedent.

The Edwards Court justified its refusal to consider the instant claim by referring to dicta in Hill v. United States, 368 U.S. 424, 428 (1962), which were interpreted as providing a "gloss" on §2255. Edwards imposes a test, derived from these dicta, that all nonconstitutional or nonjurisdictional claims now

must meet before they may be considered on collateral attack: whether the claimed error of law was " a fundamental defect which inherently results in a complete miscarriage of justice," and presents "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." Edwards, supra at 654. The Supreme Court has never presented or used these dicta as an exclusive test, or as a justification for refusing to redress a clear violation of a law of the United States.

Only twice has the Supreme Court found particular claims noncognizable under §2255: in Sunal v. Large, 332 U.S. 174 (1947), where petitioner was found to have deliberately bypassed available appellate remedies,* and in Hill, supra. The claim asserted in Hill clearly was not of the "character or magnitude," id. at 428, warranting relief on collateral attack. Hill alleged a merely formal violation of his right of allocution: that the judge who had sentenced him had forgotten to ask Hill personally whether he had anything to say at sentence. Hill did not allege that he was denied an opportunity to speak, or even that he had anything he wished to say at sentence. See

* For a fuller discussion of this point, see Appellee's brief on appeal at 21-29.

id. at 429. In deciding not to grant relief which would have afforded Hill nothing more than a meaningless repetition of his sentencing proceeding, the Court stressed that it was not deciding whether a true violation of the right of allocution would be cognizable under §2255. Id. at 429. The Court's comment that its decision might have been different if Hill had shown a fundamental defect resulting in a miscarriage of justice was simply not presented as a test, or as a statement of the only circumstance under which a claim would have been considered.

Unlike Hill, petitioner-appellee herein has established a clear violation of rights provided him by a law of the United States. Petitioner suffered exactly the sequence of events Congress prohibited in the Interstate Agreement on Detainers. It is both unnecessary and inappropriate for the courts to assess the importance of the right granted by this law, because Congress has already done so. As this Court has recognized, it is not the courts' role to "extricate the United States from the unequivocal terms of the Agreement enacted by the Congress." United States v. Mauro, 544 F.2d 588, 595 (2d Cir.

1976), cert. granted, 46 U.S.L.W. 3183 (October 4, 1977); see United States v. Ford, 550 F.2d 732, 744 (2d Cir. 1977), cert. granted, 46 U.S.L.W. 3183 (October 4, 1977).

D. The Test Applied in Edwards Is Not
Established by Precedent in This Court.

Neither has this Court ever found a claimed violation of a law of the United States not to be cognizable on collateral attack solely on the basis of the Hill dicta. In Del Vecchio v. United States, 556 F.2d 106 (2d Cir. 1977) and in Alfano v. United States, 555 F.2d 1128 (2d Cir. 1977), the Court declined to extend application of court-made prophylactic rules to provide a basis for relief on collateral attack. In Del Vecchio, the Court declined to extend application of the rule in United States v. McCarthy, 394 U.S. 459 (1969) to a §2255 petitioner who alleged that he had not been advised of a "consequence" of his guilty plea, but did not allege that he was unaware of that consequence. The Court specifically stated that it was not deciding whether an actual violation of Fed. R. Crim.P. 11 could be raised on a §2255 motion, 556 F.2d at 110. In Alfano, the Court decided not to extend

application of the exclusionary rule created by the Court's earlier decision in United States v. Gigante, 538 F.2d 502 (2d Cir. 1976) (concerning the timely sealing of wiretap evidence).

Although the opinions in both cases quote the dicta from Hill, the actual decisions in Del Vecchio and Alfano manifest the Court's proper exercise of its power to implement court-made rules. In Edwards, however, the Court elevated the dicta from Hill into a mandatory test and for the first time, utilized that test to preclude consideration of a blatant statutory violation.

POINT II

THE DECISION IN EDWARDS IS OF EXCEPTIONAL IMPORTANCE

Because Edwards represents the first decision institutionalizing the Hill dicta as a mandatory jurisdictional test to be applied whenever a nonconstitutional or nonjurisdictional claim is raised on a §2255 motion, Edwards is a watershed decision in §2255 litigation. Appellant Edwards was proceeding pro se so the Court did not have the benefit of oral argument,

or a brief by counsel, before reaching this complex and significant jurisdictional issue. Petitioner-appellee therefore respectfully submits that the decision whether the test set forth in Edwards stands as the law of the Circuit is one that should be made by the Court en banc with both parties represented by counsel.

The questionable nature of the test adopted in Edwards is well illustrated by the instant case. The decision in Edwards amounts to an assertion that the courts may decline to fully enforce a law of the United States if the courts disagree with Congress' assessment of the importance of the law. As the other jurisdictions to have considered the question have found, the plain language of §2255, coupled with the plain language of the Interstate Agreement on Detainers, provides no justification for declining to consider the claim raised herein. Congress did not leave the courts discretion to determine when to enforce the clear and mandatory provisions of the statutory provision at issue herein. Utilizing a court-fashioned test to delimit §2255 jurisdiction and thereby to preclude consideration of this claim

contravenes the will of Congress.

Therefore, petitioner-appellee respectfully submits that the Court en banc should reconsider whether this court-fashioned test should be applied to prevent consideration in a §2255 proceeding of a claimed violation of this, or any other, law of the United States.

CONCLUSION

FOR ALL OF THE REASONS SET FORTH ABOVE AND IN OUR PAPERS PREVIOUSLY SUBMITTED AND FILED WITH THIS COURT, APPELLEE'S PETITION SHOULD BE GRANTED AND THE ORDER ENTERED FEBRUARY 8, 1978, SHOULD BE REVIEWED BY THIS COURT SITTING EN BANC.

Dated: New York, New York
February 21, 1978

Respectfully submitted,

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United States Court of Appeals

FOR THE
SECOND CIRCUIT

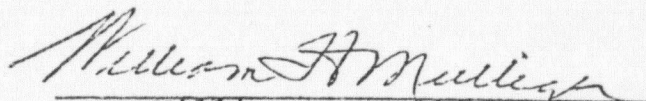
At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 8th day of February one thousand nine hundred and seventy-eight

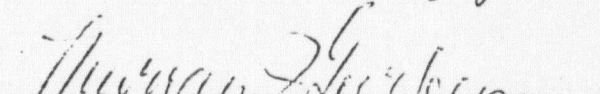
Present: HON. WILLIAM H. MULLIGAN
HON. MURRAY I. GURFEIN,
Circuit Judges
HON. FRÉDERICK vP. Bryan,
~~Circuit Judge~~ District Judge*

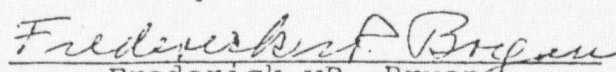
ROBERT J. ENRIGHT,
Petitioner-Appellee,
-against-
UNITED STATES OF AMERICA,
Respondent-Appellant.

77-2133

The United States of America appeals from an order of the Hon. Charles M. Metzner, United States District Judge, entered in the United States District Court for the Southern District of New York on September 14, 1977. The order granted petitioner's motion pursuant to 28 U.S.C. § 2255 to dismiss Indictment 74 Cr. 1152 and to vacate his conviction thereon on the grounds that it violated the Interstate Agreement on Detainers (I.A.D.), 18 U.S.C. App. Subsequent to the entry of the order below, this court held in Edwards v. United States, 564 F.2d 652 (2d Cir. 1977), that a claim based on the I.A.D. was not cognizable under 28 U.S.C. § 2255. Therefore, we reverse and remand for the entry of an order in accordance with Edwards.


William H. Mulligan


Murray I. Gurfein


Frederick vP. Bryan

*United States District Judge for the Southern District of New York, sitting by designation.

AFFIDAVIT OF SERVICE BY MAIL.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ARLENE E. MOSKWA , being duly sworn deposes and says:

I am not a party to the action and am over 18 years of age.

On February 21 , 1978, I served the within
Petition for Rehearing En Banc.
upon Denise Cote, Esq. Assistant United States Attorney
at 1 St. Andrew's Plaza, New York, New York 10007

by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in-- a post office -- official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me this
21st day of February 1977.

Arlene E Moskwa
ARLENE E. MOSKWA

Ruth Cassell

 Notary Public
 RUTH CASSELL
 Notary Public, State of New York
 No. 31-4607156
 Qualified in New York County
 Commission Expires March 30, 1977

